

## **RAISED BILL NO. 954**

### **AN ACT CONCERNING THE ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS**

Testimony of Richard Emanuel, member of the executive board of the Connecticut Criminal Defense Lawyers Association, in support of Raised Bill No. 954, with certain suggestions for improving the legislation.

Chairman Coleman, Chairman Fox, and Distinguished Members of the Judiciary Committee:

The Connecticut Criminal Defense Lawyers Association (CCDLA) is a statewide organization of approximately 350 licensed lawyers, in both the public and private sectors, dedicated to the defense of individuals accused of criminal offenses. Founded in 1988, CCDLA works to improve the criminal justice system by ensuring that the individual rights guaranteed by the Connecticut and United States Constitutions are applied fairly and equally and that those rights are not violated or abridged.

CCDLA is strongly in favor of legislation that would require the electronic recording of custodial interrogations and statements in all felony investigations. In pursuit of that ultimate objective, CCDLA thanks the legislature for its support and authorization of the pilot project that has been ongoing in several Connecticut jurisdictions. It is very encouraging that police officials are reporting extremely positive results from the pilot program. See *Update on the Recording of Custodial Interrogations Pilot Project* (Feb. 28, 2011) (memorandum from Mitch Forman, Grants and Contracts Manager, to Kevin Kane, Chief State's Attorney). For example, the *Update* reports that in Bridgeport,

- "100% of detective users now have positive opinions regarding recording the interviews";

- the State's Attorney for the Judicial District of Fairfield "feels that the use of this technology has a beneficial effect on the presentation of evidence";
- the Deputy Chief of Police reports "that the tapes may be facilitating guilty pleas," and that "[a]s far as the use of the equipment is concerned, its use is at this point institutionalized here and we are outfitting a second interview room with the same equipment."

*Id.*, pp. 1-2. Notably, such findings are consistent with the positive findings of national experts in this field. See, e.g., Thomas P. Sullivan, *Electronic Recording of Custodial Interrogations: Everybody Wins*, 95 J. Crim. L. & Criminology 1127 (2005).

In October of 2010, in the case of *State v. Lockhart*, 298 Conn. 537 (2010), the Connecticut Supreme Court declined to adopt a recording requirement.<sup>1</sup> Although the majority in *Lockhart* repeatedly acknowledged the benefits that could ensue from a recording requirement; see *id.*, 543-44, 565, 569, 570 & n. 13, 575, 577; the majority believed that a recording requirement should be a matter of legislative policy: "Because we believe that the legislature is better suited to gather and assess the facts necessary to establishing a recording requirement, we defer to this branch." *Id.*, 577.

At this point in time, the "facts" are in, and they prove without doubt that a recording requirement will increase the *accuracy and reliability* of evidence presented in our criminal courts. An electronic recording is obviously the "best evidence" (and the only original evidence) of what occurs in the interrogation room. Since interrogation evidence often carries the consequence of confinement, there is no principled reason to settle for conflicting or ambiguous accounts of what occurred

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<sup>1</sup> The *Lockhart* court unanimously held that recording was not required by our state constitution. Four justices also declined to impose such a requirement pursuant to the Supreme Court's inherent supervisory authority over the administration of justice. In a concurring opinion, Justice Richard Palmer argued that a recording requirement *should* be adopted under the court's supervisory powers. See *State v. Lockhart*, *supra*, 587-620 (concurring opinion).

during an interrogation, when we possess the means to capture a complete and accurate account of the actual interrogation and any resulting statements.

Unquestionably, a recording requirement will benefit all participants in the criminal justice system—police, prosecutors, defendants, defense lawyers, jurors, and trial and appellate judges and justices. It will obviate or greatly reduce the need for protracted suppression hearings, thereby conserving valuable legal and judicial resources. See *State v. Conger*, 652 N.W. 2<sup>nd</sup> 704, 707 & n. 1 (Minn. 2002) (noting positive effects of that state’s recording requirement: “We take judicial notice of the fact that fewer cases come before us in which a key issue is whether a suspect waived his or her constitutional rights during interrogation.”). And it will “promote the fair and impartial administration of justice in this state”; *State v. Lockhart*, *supra*, 588 (concurring opinion); thereby increasing the public’s respect for, and its confidence in, our criminal justice system.

Although CCDLA supports Raised Bill No. 954, CCDLA offers a few suggestions that would both clarify and strengthen the recording requirement.

**1. Subsection (b), the “presumptive inadmissibility” rule:** CCDLA believes that subsection (b) is problematic for two principal reasons.

First, the requirement to record is only phrased in negative terms. That is, under subsection (b) a statement obtained during a custodial interrogation is “presumed to be inadmissible” *unless* the statement has been electronically recorded and the recording is “substantially accurate and not intentionally altered.” CCDLA believes that the legislation should contain at the outset a recording requirement phrased in positive, affirmative terms, specifying both the *obligation to record and the scope of that which must be recorded*, e.g., the entire interrogation, including the administration of *Miranda* warnings and any responses to those warnings.<sup>2</sup> Another

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<sup>2</sup> For just a few examples of statutes that set forth an affirmative duty to record, or specify the content of what must be recorded, see D.C.Code Ann. § 5-116.01(a),(b) (the police “shall electronically record, *in their entirety*, and to the greatest extent feasible, custodial interrogations . . .” and the recording “shall *include the giving of any warnings as to rights* required by law”) (Emphasis added.); N.Mex. Stat. ch. 29-

example of a provision mandating an obligation to record may be found in subsection (b) of the bill submitted by the CCDLA, which is reproduced below.<sup>3</sup>

Second, the Raised Bill provides that the recording requirement would only apply to a person "under investigation for or accused of a capital felony or a class A or B felony." CCDLA believes that limiting the recording requirement in this manner is not only ill-advised, but highly unworkable. For example, would the limitation (to a capital felony or class A or B felony) be measured *as of the time the statement is obtained*, or *at the time of trial*? A suspect may initially be "under investigation for or accused of" a "qualifying" offense (capital felony or class A or B felony), but subsequently be charged with a lesser felony or misdemeanor. And the opposite is also true: a suspect may be subjected to custodial interrogation for a misdemeanor or class C or D felony, yet the interrogation might ultimately result in the suspect being accused of an offense for which electronic recording *would have been* required. Furthermore, the police do not make the ultimate decision as to the charges brought against a defendant. Although the police arrest and "book" an individual for specific criminal offenses, once that suspect is brought into court, the prosecuting official has considerable discretion (and for a considerable amount of time) to increase, decrease, amend, or substitute the charges against the defendant.

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1-16 A. (1) ("the custodial interrogation shall be electronically recorded *in its entirety*") (Emphasis added.); N.C. Gen. Stat. § 15A-211(a) ("The purpose of this Article is to require the creation of an electronic record of *an entire custodial interrogation*," and recording must include "a law enforcement officer's *advice to the person in custody* of that person's constitutional rights. . . .") (Emphasis added.). See also, N.J. Sup. Ct. R. 3:17(a) ("all custodial interrogations conducted in a place of detention must be electronically recorded. . . .").

<sup>3</sup> CCDLA proposed the following language: "(b) Any custodial interrogation of a person at a place of detention, including any statement made by the person, *shall be electronically recorded in its entirety* if such person has been arrested for, or is accused of or under investigation for the commission of a felony. The electronic recording of the custodial interrogation *shall include the advisement of rights and the person's response to the advisement of rights*. If the person was advised of his rights prior to commencement of the custodial interrogation, the person shall again be advised of his rights at the commencement of the electronically recorded custodial interrogation." (Emphasis added.)

See, e.g., Practice Book § 36-17 (providing in part that “[i]f the trial has not commenced, the prosecuting authority may amend the information, or add additional counts, or file a substitute information”). In CCDLA’s view, the least confusing and most practical suggestion is to impose a recording requirement with respect to all felonies, i.e., to the “statement of a person under investigation for or accused of a felony.”

**2. Subsection (d), the “violation” section:** The omission from the Raised Bill of a provision affirmatively requiring electronic recording (as discussed in § 1 above), must be viewed in light of subsection (d), which provides:

“If the court finds by a preponderance of the evidence that the person was subjected to a custodial interrogation *in violation of this section*, then any statements made by the person during or following that nonrecorded custodial interrogation, even if otherwise in compliance with this section, are presumed to be inadmissible in any criminal proceeding against the person except for the purposes of impeachment.” (Emphasis added.)

The essential problem here is that because there is no expressly stated, affirmative obligation to record (but only a rule of presumptive inadmissibility unless certain interrogations are recorded), a trial court may be hard-pressed to actually “find” that a person “was subjected to a custodial interrogation in violation of this section.” In other words, “what (and where) is the *violation*?” Construed strictly, subsection (b) merely sets forth a rule of “presumptive inadmissibility.” But since subsection (b) does not require the doing of any affirmative act, it is difficult to see how a court would find that there has been a “violation” of that duty. That is why the legislation should contain an express affirmative obligation to record—in which case subsection (d) would apply in a more meaningful way. As currently worded, subsections (b) and (d) may prove difficult, if not impossible, to reconcile.

**3. Subsection (e), the “exceptions” to a recording requirement:** CCDLA suggests that some modifications be made in this subsection, lest the exceptions swallow the rule. For example, subsection (e)(2) would authorize the admission of a statement made during custodial interrogation “that was not recorded as required by

this section because electronic recording was *not feasible*.” (Emphasis added.) CCDLA suggests that this language be amended to read “not feasible due to unforeseeable equipment failure or malfunction, or due to other exigent circumstances.” See, e.g., N.C. Gen. Stat. § 15A-211(e)(2) (providing exception where failure to record is due to “unforeseeable equipment failure, and obtaining replacement equipment was not feasible”); N.Mex. Stat. ch. 29-1-16 B. (1), (2) (“good cause” for not recording an interrogation includes the fact that “electronic recording equipment was not reasonably available” or the “recording equipment failed and obtaining replacement equipment was not feasible”).

CCDLA also believes that subsection (e)(9), which would authorize the admission of “[a]ny other statement that may be admissible under law,” is much too broad, and of uncertain meaning.

**4. Subsection (f), the burden of proof for exceptions:** This subsection provides that “[t]he state shall have the burden of proving, by a preponderance of the evidence, that one of the exceptions specified in subsection (e) of this section is applicable.” CCDLA believes that a higher burden of proof should be required to justify the state’s reliance on one of the listed exceptions. Proof by “a preponderance of the evidence” presents a relatively low threshold of proof, requiring only that a fact or issue be “more probable than not.” In view of the importance of a recording requirement, CCDLA recommends that the state be required to prove the applicability of an exception by “clear and convincing evidence.” The “clear and convincing evidence” standard is generally interpreted to mean that a fact or issue is “highly probable”; *State v. Jarzbek*, 210 Conn. 396, 397-398 (1989); or that there is a “substantially greater probability” that the fact or issue is true rather than false. See *Lopinto v. Haines*, 185 Conn. 527, 534 (1981); *Dacey v. Connecticut Bar Association*, 170 Conn. 520, 536-538 (1976).

**5. Subsection (h), the “catch-all” provision:** CCDLA opposes subsection (h), which could essentially undermine the recording requirement. Subsection (h)

provides that the presumed inadmissibility of an (unrecorded) statement "may be overcome by a preponderance of the evidence that the statement *was voluntarily given and is reliable*, based on the totality of the circumstances." (Emphasis added.) This will amount to a "free pass" for many unrecorded statements, and may act as a *disincentive to record*. Pursuant to this subsection, police officials theoretically could decide *not* to record a custodial interrogation, secure in the knowledge that the statement may nevertheless be admissible in court if the prosecution can establish (by a preponderance of the evidence) that the statement was "voluntary" and "reliable." *Almost all confessions and statements that are challenged in court as being "involuntary," are in fact found to be "voluntary,"* which simply means that the statement was not "coerced" by the police. And the "reliability" factor—a factor not generally utilized in determining the admissibility of statements and confessions—adds little of substance to the equation. In short, in most cases the prosecution would probably have little trouble in admitting unrecorded statements pursuant to subsection (h).

For the reasons stated above, the CCDLA respectfully urges this Committee to incorporate the suggested modifications to Raised Bill No. 954.

